IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 409 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GULIA @ GULA VIRSING RATHOD

Versus

STATE OF GUJARAT

Appearance:

MR SK BUKHARI for Appellant

MR KC SHAH, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

Date of decision: 05/10/98

ORAL JUDGEMENT (Per Dave, J.)

1. The appellant came to be convicted by learned Additional Sessions Judge, Panchmahals, Camping at Dahod, under Section 302 of the Indian Penal Code for the murder of Bai Madiben, widow of Ajim Virsing Rathod, and was sentenced to undergo imprisonment for life. He was also

imposed a fine of Rs.1000/- and was ordered to undergo further imprisonment for three months in case of default in payment of fine. The said judgment and order came to be passed on 11th March, 1993 in Sessions Case No.35 of 1992 by the learned Additional Sessions Judge.

2. The facts of the case are that, accused-Gulia alias Gula Virsing Rathod had a brother named Ajim. Ajim was married to Bai Madi (the deceased). Within the wedlock, Bai Madi delivered Gita and Babu, a daughter and a son. On death of Ajim, Madi started staying with Gala Dita Gohri. Out of her association with Gala Dita, she delivered a son named Diniya. It transpires that the landed properties of deceased Ajim were in possession of Bai Madi and were being cultivated by Gala Dita and there was a dispute going on between the accused and the deceased in this regard. On the day of the incident, i.e. on 18th October, 1991, at about 7.00 A.M., when the deceased was at her place, accused-Gula Virsing Rathod, who happens to be the elder brother of Ajim, reached there. There was an altercation between deceased-Madiben and the accused, and the accused gave three blows to the deceased with a spade, which, ultimately, resulted into death of Bai Madi. The incident was witnessed by minor son of deceased-Madiben, Babu. He rushed to his maternal uncle-Anopbhai, who, in turn, came to the place of incident and then went to Garbada Police Station for lodging the F.I.R. The police registered the offence and investigated the matter and, on finding sufficient evidence against the accused, filed charge sheet before the learned Chief Judicial Magistrate, Panchmahals, at Godhra. When the case came up for evidence before the learned Additional Sessions Judge, after it was committed to the Court of Sessions, the accused pleaded not guilty and expressed his desire to face the trial. The learned Additional Sessions Judge, after considering the evidence on record, came to a conclusion that the charge against the accused stood proved and, ultimately, passed the verdict of conviction and imposed the sentence, as stated above. Being aggrieved by the said judgment and order, the original accused has preferred this appeal.

3. Mr. S.K. Bukhari, learned advocate appearing for the appellant, has made three fold attack on the impugned judgment. He, firstly, submitted that Babu, minor son of deceased-Madiben, could not have been relied upon by the learned Additional Sessions Judge. According to him, firstly, he is a child witness; secondly, he was staying with his maternal uncle and, therefore, there is a possibility of him having been tutored; and, thirdly, although Babu had gone to the Police Station with his

maternal uncle-Anopbhai, when Anop went to the Police Station for lodging the F.I.R., Babu's statement was recorded only on the next day. If he really was the eye-witness, his statement would have been recorded by the police immediately there and then. In order to substantiate his argument on this point, he has placed reliance on the case of Chhagan Dame v. State of Gujarat A.I.R. 1994 SC 454.

3.1 Another facet of attack on behalf of the appellant, by learned advocate Mr. Bukhari, is that, although independent witnesses were available, they have not been examined by the prosecution. He has placed reliance on the case of Bir Singh & Ors. v. State of U.P., A.I.R. 1978 SC 59.

3.2 Lastly, Mr. Bukhari submitted that the discovery of the weapon cannot be believed. He submitted that the Panch witnesses have not supported the prosecution case. The Investigating Officer also has not proved the Panchnama properly and last but not the least, the nature of the weapon that is alleged to have been used in the commission of the offence and discovered by the accused totally changes. He has placed reliance on the decision of the Supreme Court in the case of Kailash Potlia v. State of Andhra Pradesh, A.I.R. 1996 SC 66. He, ultimately, urged that the appeal may be allowed and the impugned judgment and order may be set aside.

3.3 By way of alternative submission, Mr. Bukhari submitted that, in the event this Court is not inclined to entertain this appeal favourably, the case of the accused would fall under Section 304 of Indian Penal Code. In support of thereof, he has placed reliance upon the following decisions :-

(1) Ramotar v. State of M.P, A.I.R. 1993 SC 302.
(2) Jagpati v. State of M.P., A.I.R. 1993 SC 1360.
(3) Dalip Singh & Ors. v. State of Haryana, A.I.R. 1993 SC 2119.

4. On the other hand, learned Additional Public Prosecutor, Mr. K.C. Shah, has supported the impugned judgment and order. According to him, the decisions relied upon by Mr. Bukhari cannot be applied to the facts of the present case. While drawing attention of this Court to the medical evidence, he submitted that there are as many as three incise injuries besides multiple bruises found on person of the deceased and, therefore, the case cannot fall under Section 304 of Indian Penal Code. Mr. Shah has then adopted the reasoning given by

the learned trial Judge for coming to his conclusion recording conviction and urged that the appeal may be dismissed.

5. We have been taken through the relevant portions of the evidence from the record and proceedings before us by both the sides.

6. It transpires from the evidence that Babu has witnessed the incident. Upon seeing the incident, he immediately rushes to his maternal uncle-Anop and Anop, thereupon, rushes to the Garbada Police Station and lodges the F.I.R. The incident has taken place at about 7.00 A.M. on 18th October, 1991 and the F.I.R. is registered at 11.05 A.M. The incident occurred at village Gangardi, which is at a distance from Garbada. As such, there is no delay in lodging the F.I.R. considering that, upon knowing about the incident, the complainant has gone to the place of incident, which is at a distance of about 3 kms. from village Gangardi and, thereafter, he has approached the police. Eye-witness Babu is a young boy of 9 years of age. We have closely perused and scrutinized his deposition, Ex.19, and the ring of truth is quite audiable. He has stood fast to his original version despite a piercing and tactful cross-examination, of course, during cross-examination he admits that people had gathered when the incident occurred. There is no reason to doubt this witness as a tutored witness simply because he has started staying with his maternal uncle. This young boy had lost his father earlier. He had lost his mother at the hands of his own uncle (elder brother of his father - the accused). Where elese would he go and who else would give him shelter? Further, this witness has no reason to let go the real culprit and falsely implicate the accused, who happens to be his own uncle. After all, he is not going to be benefitted in any manner by this falsehood and, therefore, there is no reason to disbelieve this witness. The reasons shown in order to substantiate this argument, therefore, cannot be accepted.

7. The incident has taken place inside the house in Parasala. Babu says that the neighbouring people had come but he does not say as to when they had come, whether at the time when the altercation was going on, whether at the time when the accused inflicted blows or whether thereafter, is a question which remains unanswered. Of course, a close scrutiny of his deposition makes it very clear that people must have gathered subsequent to the incident because it transpires

from the cross-examination of Babu that when, after the incident, he rushed to his maternal uncle to report about the incident, nobody met him. If people had gathered, probably the answere would have been otherwise. As such, therefore, it is difficult to accept that the prosecution has kept back other eye witnesses. The social situation/scenario existing reflects a very sorry situation, where people are reluctant to help the law enforcing machinery and are reluctant to come forward as witness either before the Investigating Agency or before the Court and, therefore, keeping in mind this situation, a strait-jacket formula cannot be enforced that where there are no independent witnesses, interested witnesses cannot be believed. The decision in the case of Bir Singh (supra), relied upon in this regard by Mr. Bukhari, even otherwise, would not be applicable. In that case, the situation was that of the eye-witnesses who were examined by the prosecution had serious animus against the accused and were interested in implicating the accused and, in that case, the prosecution had failed to examine independent witnesses or to tender any reasonable explanation for non-examination of such witnesses. In the instant case, as discussed above, the eye-witness is the nephew of the accused and there is no allegation of any animus against the accused and, rightly so, a young child of 9 years cannot have any animus against anyone. On the contrary, non-availability of eye witness because of tendency on part of people to avoid helping investigation has to be kept in mind while considering the question of non-availability of independent witness (State of UP v. Anil Singh, A.I.R. 1988 SC 1998).

8. As regards the discovery of weapon, it appears that the Panch witnesses have not supported the prosecution case. If the deposition of the Investigating Officer, P.S.I.-D.B. Rajput, Ex.25, is perused, he says that the accused had discovered, in presence of Panch witnesses, the spade on 20th October, 1991. A Panchnama was drawn, which is at Ex.26. This Panchnama, therefore, cannot be said to have been properly proved by the prosecution and cannot be relied upon to base conviction. While considering the question as to whether this discovery would affect the version emerging from deposition of Babu, followed by deposition of complainant-Anop, as the nature of weapon changes in this discovery Panchnama, it has to be recorded at the outset that, even if the discovery Panchnama is totally ignored, the prosecution case stands established through the deposition of witness-Babu. As discussed earlier, the Panchnama is not proved and cannot be relied upon.

Despite that, even if that is considered in favour of the accused, it speaks of discovery of pick-axe. However, if the cross-examination of the Investigating Officer, D.B. Rajput, through whom this discovery Panchnama is exhibited, is perused, it appears that no dispute is raised about the nature of the weapon, i.e. whether it was spade or pick-axe. On the contrary, consistently, the question during cross-examination referred to spade and spade alone and, therefore, there could be a possibility of different names being used for the same weapon, which cannot be ruled out and this error cannot, ultimately, falsify the whole of the prosecution case and, as such, the third argument advanced on behalf of the appellant also is rendered unacceptable.

9. Coming to the question whether the case of the accused-appellant would attract the provisions of Section 304 of I.P.C., it may be noted that from the evidence of Babu, Ex.19, it is amply clear that the accused came to the house of the deceased. He was equipped with spade. There was some heated exchange of words and he, ultimately, caused vital injuries to the deceased lady. Therefore, it is not possible to accept the argument advanced on behalf of the appellant as no case is made out to bring it under the provisions of Section 304 either Part I or Part II. The other circumstances also indicate the same thing. The accused has caused as many as three incised injuries with the help of the weapon, two are on left parietal region and one on the left arm, besides multiple bruises over chest and trunk. This indicates that the accused consistently went on inflicting one blow after the other. The injury has caused fractures of 5th, 6th and 7th left ribs. There is fracture of skull bone on the left parietal region. Looking to the nature of the weapon that is used, looking to the manner in which the injuries are caused in succession, looking to the place of incident, there cannot be any other inference than the accused having an intention to cause death of the deceased, when he has pounced on a helpless and defenceless lady. No better evidence could be expected to be led to indicate and establish the intention of the accused of causing murder of the deceased. The decisions relied upon by Mr. Bukhari, in this regard, therefore, cannot help the appellant.

10. The sum total of the above discussion is that there is no merit in the appeal. We fully agree with the verdict and the reasoning adopted by the learned trial Judge and hereby confirm the same. The appeal is dismissed.

[J.N. BHATT, J.] [A.L. DAVE, J.]

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